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MOHD ABDUL KARIM ABDULLAH & ORS v. LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR PCA
ABDUL RAHMAN SEBLI CJ (SABAH & SARAWAK)
B ZABARIAH MOHD YUSOF FCJ
[CIVIL APPLICATION NO: 08(i)-66-03-2024(B)]
24 JUNE 2025

C **Abstract** – *There is no conflict, ambiguity or confusion on the meaning and application of s. 46 of the Employees Provident Fund Act 1991 in respect of the proper party and the question of joint and several liability of directors who were/are directors during the period of default to pay outstanding Employees Provident Fund contributions. Even if a company is not sued or taken action against together with the directors,*
D *the joint and several liability under the said s. 46 is effective and capable to be enforced against one director only, in the absence of another director or the company itself.*

E ***COMPANY LAW:*** *Directors – Personal liability – Whether directors of company jointly and severally liable for Employees Provident Fund contributions due and payable – Whether directors may be sued independent of company – Liability of directors, nature of – Employees Provident Fund Act 1991, ss. 46*

F ***PROVIDENT FUND:*** *Arrears of contribution – Recovery of arrears of Employees Provident Fund ('EPF') contributions – Whether directors of company jointly and severally liable for EPF contributions due and payable – Whether directors may be sued independent of company – Employees Provident Fund Act 1991, ss. 46*

G ***PROVIDENT FUND:*** *Liability of employer – Directors of company – Whether directors of company jointly and severally liable for Employees Provident Fund contributions due and payable – Whether directors may be sued independent of company – Liability of directors, nature of – Employees Provident Fund Act 1991, ss. 46*

H ***STATUTORY INTERPRETATION:*** *Construction of statutes – Interpretation – Employees Provident Fund Act 1991, s. 46 – Whether barred Employees Provident Fund ('EPF') from naming director only in claim for EPF contributions due and payable – Whether directors of company jointly and severally liable for EPF contributions due and payable – Liability of directors, nature of*

I The applicants sought leave to appeal under s. 96(a) of the Courts of Judicature Act 1964 ('CJA') against the decision of the Court of Appeal which ruled, that following *Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja* ('*Ong Kim Chuan*'), 'the directors may be sued independent of the company ... and that s. 46 of the Employees Provident

Fund Act 1991 ('EPF Act') does not bar the EPF to name only director in their claim'. The Employees Provident Fund Board ('respondent') filed a writ against the applicants who were registered directors of Serba Dinamik Group Bhd ('company') for the failure to pay the outstanding Employees Provident Fund ('EPF') contributions liable to be paid for the period commencing September 2021 until July 2022 ('period of default') together with dividends and late payment charges. The company was, however, not named or made a party in this suit. The respondent had filed for a summary judgment under O. 14 of the Rules of Court 2012 ('ROC'). It was the applicants' case, *inter alia*, that the respondents ought to have not claimed against the applicants separately or independently of the company by virtue of s. 46 of the Companies Act 2016. The applicants alleged that the claim was tainted with *mala fide* as the respondent had selectively prosecuted its claim against the directors only. Against those assertions, the respondent submitted that the outstanding EPF contributions claimed were for the period of default from September 2021 until July 2022, where the applicants were the registered directors and hence, by virtue of s. 46 of the EPF Act, the directors shall, together with the company, be jointly and severally liable for the contributions due and payable to the fund. The High Court, having been satisfied that there was no triable issue raised, allowed the summary judgment. Dissatisfied, the applicants appealed to the Court of Appeal, but failed. Aggrieved, the applicants filed leave to appeal to this court, proposing several questions of law revolving around the meaning and application of s. 46 of the EPF Act.

Held (dismissing application for leave to appeal)
Per Abang Iskandar PCA delivering the judgment of the court:

(1) Having analysed *Ong Kim Chuan*, the Court of Appeal did state in its judgment the phrase 'shall together with the company', when it said that 'Under s. 46, it is crystal clear that directors of a company (including persons or former directors who were directors during such periods in which contributions were liable to be paid to the EPF) shall together with the company be jointly and severally liable ...'. The Court of Appeal was obviously and fully aware of that phrase, and yet despite that, it was of the view that the directors could be held jointly and severally liable by virtue of that provision, and that a plaintiff has the right to proceed with its claim against the directors only. (paras 31 & 32)

(2) There was no ambiguity in the interpretation of s. 46 of the EPF Act which required further clarification by this court. The applicants had not in fact provided any authority to support its proposition as to how and where the Court of Appeal had gone wrong in the *Ong Kim Chuan* case. There was also no authority to show that there have been different or conflicting interpretations on s. 46 of the EPF Act in respect of the

proper party and the question of liability. The court in *Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan* ('*Edwin Cassian*') had clearly given effect to the provision in s. 46 of the EPF Act even in a case where the court's judgment did not state such phrase of 'joint and several liability' in a bankruptcy suit filed against a director only. That case indicated that even if a company is not sued or taken action against together with the directors, the joint and several liability under s. 46 of the EPF Act is effective and capable to be enforced against one director only, in the absence of another director or the company itself. (paras 36 & 37)

(3) Consistency in interpretation by the courts, as was shown by the relevant authorities, meant that there is no conflict, as yet, or ambiguity or confusion on the meaning and application of s. 46 of the EPF Act in respect of the proper party and the question of joint and several liability of directors who were/are directors during the period of default to pay the outstanding EPF contributions. *Edwin Cassian* had shown that even if only one director is sued against, that action is valid and proper in accordance with the said provision where the joint and several liability is given effect and enforceable. Thus, this application for leave to appeal did not fulfill the threshold requirement under s. 96(a) of the CJA. There was no novelty, neither will further ventilation before this court will be of public advantage. The EPF Act's assertion, being a piece of social legislation, whose paramount objective is to protect the welfare of the employee, ought to be enforced. (paras 39 & 40)

Bahasa Melayu *Headnotes*

Pemohon memohon kebenaran untuk merayu bawah s. 96(a) Akta Mahkamah Kehakiman 1964 ('AMK') terhadap keputusan Mahkamah Rayuan yang memutuskan, bahawa berikutan *Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja* ('*Ong Kim Chuan*'), 'pengarah-pengarah boleh disaman bebas daripada syarikat ... dan s. 46 Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta KWSP') tidak menghalang KWSP untuk menamakan pengarah sahaja dalam tuntutan mereka'. Lembaga Kumpulan Wang Simpanan Pekerja ('responden') memfailkan writ terhadap pemohon iaitu pengarah berdaftar Serba Dinamik Group Bhd ('syarikat') atas kegagalan membayar caruman Kumpulan Wang Simpanan Pekerja ('KWSP') tertunggak yang perlu dibayar bagi tempoh bermula September 2021 sehingga Julai 2022 ('tempoh ingkar'), bersama-sama pembayaran dividen dan caj lewat. Syarikat itu, walau bagaimanapun, tidak dinamakan atau dijadikan pihak dalam saman ini. Responden telah memfailkan penghakiman ringkas bawah A. 14 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Adalah kes pemohon, antara lain, bahawa responden sepatutnya tidak menuntut terhadap pemohon secara berasingan atau bebas daripada syarikat berdasarkan s. 46 Akta Syarikat 2016. Pemohon mendakwa bahawa tuntutan

itu dicemari dengan *mala fide* kerana responden telah secara sengaja memilih untuk membuat tuntutannya terhadap pengarah sahaja. Terhadap hujahan-hujahan tersebut, responden mengemukakan bahawa caruman KWSP tertunggak yang dituntut adalah untuk tempoh ingkar dari September 2021 hingga Julai 2022, semasa pemohon adalah pengarah berdaftar dan oleh itu, menurut kuasa bawah s. 46 Akta KWSP, pengarah hendaklah, bersama-sama syarikat, bertanggungan secara bersama dan berasingan untuk caruman yang perlu dibayar pada dana. Mahkamah Tinggi, berpuas hati bahawa tiada isu boleh bicara yang dibangkitkan, membenarkan penghakiman ringkas. Tidak berpuas hati, pemohon merayu ke Mahkamah Rayuan, namun, gagal. Terkilan, pemohon memfailkan kebenaran untuk merayu ke mahkamah ini, mencadangkan beberapa persoalan undang-undang berkisar tentang maksud dan pemakaian s. 46 Akta KWSP.

Diputuskan (menolak permohonan kebenaran untuk merayu)
Oleh Abang Iskandar PMR menyampaikan penghakiman mahkamah:

(1) Setelah menganalisis kes *Ong Kim Chuan*, Mahkamah Rayuan telah menyatakan dalam penghakimannya frasa 'hendaklah bersama-sama dengan syarikat', apabila ia mengatakan bahawa 'Di bawah s. 46, adalah jelas bahawa pengarah syarikat (termasuk orang atau bekas pengarah yang menjadi pengarah dalam tempoh sedemikian di mana caruman bertanggungjawab untuk dibayar kepada KWSP) hendaklah bersama-sama syarikat bertanggungan secara bersama dan berasingan …'. Mahkamah Rayuan jelas dan sedar sepenuhnya tentang frasa itu, namun, berpendapat bahawa pengarah boleh dipertanggungjawabkan secara bersama dan berasingan berdasarkan peruntukan itu, dan bahawa plaintif mempunyai hak meneruskan tuntutan terhadap pengarah sahaja.

(2) Tiada kesamaran dalam tafsiran s. 46 Akta KWSP yang memerlukan penjelasan lanjut oleh mahkamah ini. Pemohon sebenarnya tidak mengemukakan apa-apa autoriti untuk menyokong cadangannya tentang bagaimana dan di mana Mahkamah Rayuan salah dalam kes *Ong Kim Chuan*. Juga tiada autoriti untuk menunjukkan bahawa terdapat tafsiran yang berbeza atau bercanggah dengan s. 46 Akta KWSP berkenaan dengan pihak yang sepatutnya dan soal liabiliti. Mahkamah dalam kes *Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan* ('*Edwin Cassian*') ini jelas telah memberi kesan pada peruntukan dalam s. 46 Akta KWSP walaupun dalam kes di mana penghakiman mahkamah tidak menyatakan frasa 'tanggungan bersama dan berlainan' dalam saman kebankrapan yang difailkan terhadap pengarah sahaja. Kes itu menunjukkan bahawa walaupun syarikat tidak disaman atau diambil tindakan bersama-sama pengarah, tanggungan bersama dan berlainan bawah s. 46 Akta KWSP adalah berkesan dan boleh dikuatkuasakan terhadap seorang pengarah sahaja, tanpa kehadiran pengarah-pengarah lain atau syarikat itu sendiri.

(3) Konsistensi dalam tafsiran oleh mahkamah, seperti yang ditunjukkan oleh autoriti-autoriti, bermakna bahawa tiada konflik, atau kekaburan atau kekeliruan pada maksud dan penggunaan s. 46 Akta KWSP berkenaan pihak yang sepatutnya dan persoalan tanggungan bersama dan berlainan pengarah-pengarah yang pernah menjadi pengarah semasa tempoh ingkar untuk membayar caruman KWSP tertunggak. *Edwin Cassian* telah menunjukkan bahawa walaupun hanya seorang pengarah disaman, tindakan itu adalah sah dan wajar mengikut peruntukan tersebut di mana tanggungan bersama dan berlainan itu diberi kesan dan boleh dikuatkuasakan. Oleh itu, permohonan kebenaran merayu ini tidak memenuhi syarat ambang bawah s. 96(a) Akta Mahkamah Kehakiman 1964. Tiada kebaharuan, begitu juga pengemukaan selanjutnya di hadapan mahkamah tidak akan memberi manfaat pada orang ramai. Kenyataan Akta KWSP, sebagai satu perundangan sosial, yang objektif utamanya adalah untuk melindungi kebajikan pekerja, harus dikuatkuasakan.

Case(s) referred to:

AJS v. JMH & Another Appeal [2022] 1 CLJ 331 FC ***(refd)***

American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd [2012] 1 CLJ 506 CA ***(refd)***

Amitabha Guha & Anor v. Pentadbir Tanah Daerah Hulu Langat [2021] 3 CLJ 1 FC ***(refd)***

Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors [1999] 1 CLJ 325 FC ***(refd)***

Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor; Registrar Of Trade Marks (Intervener) & Another Appeal [2015] 4 CLJ 20 FC ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Mohd Abdul Karim Abdullah & Ors [2023] 9 CLJ 976 HC ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan [2021] 7 CLJ 823 FC ***(refd)***

Marzida Mansor v. Lembaga Kumpulan Wang Simpanan Pekerja [2023] 6 CLJ 723 CA ***(refd)***

Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja [2009] 6 CLJ 586 CA ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Sivamurthy Muniandy & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja [2012] 9 CLJ 598 CA ***(refd)***

Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor And Other Applications [2011] 1 CLJ 51 FC ***(refd)***

Legislation referred to:

Companies Act 2016, s. 465(1)(e)

Courts of Judicature Act 1964, s. 96(a)

Employees Provident Fund Act 1991, ss. 46, 65(1)

Rules of Court 2012, O. 14

For the applicants - Rajashree Suppiah & Amira Nur Nadia Azhar; M/s Rajashree
For the respondent - Afifi Ahmad, Adilah Abdul Wahid & Anis Dayana Mat Daud; M/s Nashili & Co

[Editor's note: Appeal from Court of Appeal; Civil Appeal No: B-01(iM)(NCvC)-345-07-2023; For the High Court judgment, please see Lembaga Kumpulan Wang Simpanan Pekerja v. Mohd Abdul Karim Abdullah & Ors [2023] 9 CLJ 976 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abang Iskandar PCA:

Introduction

[1] The applicants sought leave to appeal under s. 96(a) of the Courts of Judicature Act 1964 ("CJA") against the decision of the Court of Appeal which ruled, that following *Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja* [2009] 6 CLJ 586; [2009] 5 MLJ 807 ("*Ong Kim Chuan*"), "the directors may be sued independent of the company … and that s. 46 of the EPF Act does not bar the EPF to name only director in their claim."

[2] The Court of Appeal, in so ruling, had thus affirmed the granting of summary judgment by the High Court under O. 14 of the Rules of Court 2012 ("ROC"), upon finding that there are no issues to be tried.

[3] In this application for leave to appeal, the applicants proposed seven questions of law ("QOL") revolving around the meaning and application of s. 46 of the Employees Provident Fund Act 1991 ("EPF Act") relating to:

(i) the naming of a company who is an employer (and/or in the case of a company in liquidation, by involving the company and the liquidator) as a party to the suit together with its registered directors (QOL 1, 2 and 6);

(ii) the liability of the directors when the company is not made a party and its liability not being established in the first place, and in the case of a company in liquidation, the liability of the directors to pay when the statutory debt becomes a preferential debt claimable against the company and/or its appointed liquidator (QOL 3, 5 and 6);

(iii) the question of whether *Ong Kim Chuan* is good law (QOL 4); and

(iv) the correct interpretational approach (QOL 7).

[4] Having perused the cause papers in support of and in opposition of the leave application, and having read the judgment of the High Court and the broad grounds of the Court of Appeal, and having heard the submissions by both learned counsel, we are of the considered view that the applicants have failed to fulfil the threshold requirement under s. 96(a) of the CJA, for reasons that will be stated below.

A **Background Facts And The Antecedent Proceedings**

[5] The Employees Provident Fund Board ("respondent") filed the writ in December 2022 against the applicants, who were registered directors of Serba Dinamik Group Berhad ("the company") for the failure to pay the outstanding Employees Provident Fund ("EPF") contributions liable to be
B paid for the period commencing September 2021 until July 2022 ("period of default"), together with dividends and late payment charges. The company was however not named or made a party in this suit.

[6] The total sum claimed was RM2,951,000 against the first to third
C applicants; and RM330,776 against the fourth applicant which sum was calculated based on the liability period. In this case, the respondent had filed for a summary judgment under O. 14 of the Rules of Court 2012 ("ROC").

[7] It was brought to our attention, that prior to the filing of the respondent's claim, there was a petition jointly filed earlier, in April 2022,
D by HSBC Amanah Malaysia Berhad, Ambank Islamic Berhad, Bank Islam Malaysia Berhad, MIDF Amanah Investment Bank Berhad, Standard Chartered Saadiq Berhad, and United Overseas Bank (Malaysia) Bhd ("the banks"), for the winding up of the company on the ground of its inability to pay its debt under s. 465(1)(e) of the Companies Act 2016 ("CA 2016"). In
E the interim, the banks filed a summon-in-chamber for the appointment of an interim liquidator for the purposes of preserving the *status quo* of the assets of the company pending the disposal of the winding-up petition. That application was granted on 23 August 2022 and the High Court appointed Victor Saw Seng Kee, a licensed liquidator of PricewaterhouseCoopers Advisory Services Sdn Bhd as the interim liquidator over the company. On
F 10 January 2023, the company was finally wound-up and the same interim liquidator was appointed as the liquidator.

[8] The above facts are highlighted as it was the applicants' case, *inter alia*, that the respondent ought to have (i) claimed the alleged outstanding amount
G to the appointed liquidator as a statutory debt stood as a preferential debt, and/or it was the interim liquidator who failed to take any action to pay the alleged outstanding amount of contribution; (ii) included the company as a party in the writ filed and for that purpose, to apply for leave as the company was in the process of liquidation; and (iii) not claimed against the applicants separately or independently of the company by virtue of s. 46 of the
H Companies Act 2016. Additionally, the applicants, while disputing the total outstanding claimed, had also alleged that the claim was tainted with *mala fide*, as the respondent had selectively prosecuted its claim against the directors only.

I **[9]** Against those assertions, the respondent maintained that the writ was filed even before the company was wound up, and that, in any event, the outstanding EPF contributions claimed were for the period of default from

September 2021 until July 2022, where the applicants were the registered directors. And hence, by virtue of s. 46 of the EPF Act, the directors shall, together with the company be jointly and severally liable for the contributions due and payable to the fund.

[10] Further, the respondent contended that the applicants had failed to raise any issues or disputes regarding the outstanding contributions when the demand was made prior to the filing of this suit, at which time the respondent had attached a schedule of arrears of contributions (Form E) and an arrears remittance statement (Form F) as required by law. In this respect, the respondent viewed that by virtue of s. 64 of the EPF Act, the certificate in relation to its claims which was duly certified by an authorised officer of the board shall be *prima facie* evidence of the making of the certificate and of the truth of the contents thereof.

[11] The High Court, having been satisfied that there was no triable issue raised, allowed the summary judgment. Its decision is reported in *Lembaga Kumpulan Wang Simpanan Pekerja v. Mohd Abdul Karim Abdullah & Ors* [2023] 9 CLJ 976; [2024] 7 MLJ 566. Dissatisfied, the applicants appealed to the Court of Appeal, and they failed.

[12] Based on the broad grounds of the Court of Appeal, the only issue that was pursued by the applicants was on the point of s. 46 of the EPF Act. On this point, the Court of Appeal chose to follow the decision of the Court of Appeal in *Ong Kim Chuan* that the directors may be sued independently of the company. *Ong Kim Chuan* was of the view that s. 46 of the EPF Act does not bar the respondent to name only director/s in its claim. Aggrieved, the applicants filed leave to appeal to this court.

Testing The Proposed QOL Against The Threshold Requirement

[13] Section 96 of the CJA has provided for a statutory test against the application for leave to appeal. It states:

> Section 96. Conditions of appeal.
>
> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
>
> (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[14] In the oft-cited decision of this court in *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor And Other Applications* [2011] 1 CLJ 51; [2011] 1 MLJ 25 ("*Terengganu Forest*"), which follows the principles laid down by this court in *Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors* [1999] 1 CLJ 325; [1999] 1 MLJ 257 ("*Syed Kechik*"), the test for leave to appeal has been clarified and summarised, and which shall guide us, in the following manner:

> In summary, an intended applicant for leave to appeal to this court should consider the following points before filing his application, namely:
>
> (a) Basic prerequisites:
>
> (i) that leave to appeal must be against the decision of the Court of Appeal;
>
> (ii) that the cause or matter must have been decided by the High Court exercising its original jurisdiction;
>
> (iii) that the question must involve a question of law which is of general principle not previously decided by the Federal Court (first limb of s. 96(a)); and
>
> (iv) that the issue to be appealed against has been decided by the Court of Appeal.
>
> **(b) As a rule, leave will normally not be granted in interlocutory appeals.**
>
> (c) Whether there has been a consistent judicial opinion which may be uniformly wrong *eg*, *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241.
>
> (d) Whether there is a dissenting judgment in the Court of Appeal.
>
> **(e) Leave to appeal against interpretation of statutes will not be given unless it is shown that such interpretation is of public importance.**
>
> (f) That leave will not normally be given:
>
> (i) where it merely involves interpretation of an agreement unless this court is satisfied that it is for the benefit of the trade or industry concerned;
>
> (ii) the answer to the question is not abstract, academic or hypothetical;
>
> (iii) either or both parties are not interested in the result of the appeal.
>
> **(g) That on first impression the appeal may or may not be successful; if it will inevitably failed leave will not be granted** (see Lord Donaldson of Lymington MR in *The Iran Nabuvat* [1990] 3 All ER 9 at para 36. (emphasis added)

[15] As we have highlighted earlier, the crux of the applicants' application is on the meaning and application of s. 46 of the EPF Act in respect of a claim made against directors independently of the company. Essentially, by their reference to *Terengganu Forest* and *Amitabha Guha & Anor v. Pentadbir Tanah Daerah Hulu Langat* [2021] 3 CLJ 1; [2021] 4 MLJ 1, the applicants argued that leave ought to be granted as defining and clarifying the legal effect of s. 46 of the EPF Act is a question of law of general principle and of public importance.

[16] For clarity, we now reproduce the relevant part of s. 46 as follows:

> Section 46. Joint and several liability of directors, *etc.*
>
> (1) *Where any contributions remaining unpaid by a company,* a firm or an association of persons, then, *notwithstanding anything to the contrary in this Act or any other written law, the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid,* or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office-bearers of such association of persons, including any persons who were office-bearers of such association during such period in which contributions were liable to be paid, as the case may be, *shall together with the company,* firm or association of persons liable to pay the said contributions, *be jointly and severally liable for the contributions due and payable to the Fund.*
>
> (2) For the purpose of this section –
>
> "contribution" shall be deemed to include any dividend and late payment charges due on any contributions; … (emphasis added)

[17] In this case, the applicants basically questioned, on reading s. 46 of the EPF Act, in particular the phrase "shall together with the company", as to (i) whether a company or a wound-up company (with prior leave) should be named and made a party in a suit, if at all, together with its directors; (ii) whether the claim should be made first, against the company who holds the primary obligation as the employer in making EPF contributions, as and when the interim liquidator was appointed on 23 August 2022 and the company was wound up on 10 January 2023, the directors had lost all rights and control over the company *(American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506; [2012] 1 MLJ 369).

[18] The applicants contended that suing the directors alone and without the company constituted a selective prosecution that will result in the company escaping liability (when the outstanding debts stood as a preferential debts), while the directors are put in a completely untenable and unfair position for having to be made independently liable and responsible to pay in full the company's debt, in contravention of s. 46.

[19] In this regard, the applicants submitted that the interpretation of *Ong Kim Chuan* is questionable as the Court of Appeal in that case never addressed its mind on the phrase "shall together with the company" in the said provision.

[20] As such, by relying on the principle of interpretation as espoused by this court in *AJS v. JMH & Another Appeal* [2022] 1 CLJ 331; [2022] 1 MLJ 778, in respect of applying the plain and ordinary meaning of the words in statute, the applicants argued that *Ong Kim Chuan* cannot be correct, as giving a plaintiff the freedom to file any suit against the directors only is against the clear wordings of "shall together with the company". As such, leave to appeal must be granted, according to the applicants, to clarify and to state the correct interpretation of s. 46 and to answer the question as to whether *Ong Kim Chuan* is good law. It is for the public importance, as the applicants argued, because the EPF Act is a piece of social legislation.

[21] In response, the respondent submitted that the summary judgment was correctly made because there was firstly, no issue to be tried. Secondly, the applicants never disputed that they were directors during the period of default from September 2021 until July 2022, and that the suit was filed before the appointment of the interim liquidator on 23 August 2022 and the winding up of the company on 10 January 2023. Thirdly, on the proposed QOL, leave ought to be dismissed because both ss. 46 and 65(1) of the EPF Act provide a statutory basis of the legality and correctness of the institution of its claim. Section 65 allows recovery of the contributions summarily as a civil debt, while s. 46 allows joint and several liability of the directors.

[22] In its submission, the respondent highlighted two points in respect of s. 46 of the EPF Act – (i) the joint and several liability; and (ii) the *non-obstante* clause. According to the respondent, the meaning of joint and several liability was decided by this court in *Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan* [2021] 7 CLJ 823; [2021] 5 MLJ 253 ("*Edwin Cassian*") and which was applied recently by the Court of Appeal in *Marzida Mansor v. Lembaga Kumpulan Wang Simpanan Pekerja* [2023] 6 CLJ 723; [2023] 4 MLJ 364 ("*Marzida*").

[23] Thus, the respondent submitted that *Ong Kim Chuan* is and still remains good law, and that the applicants' contention that the interpretation of the Court of Appeal in *Ong Kim Chuan* was incorrect, was groundless and without merit. The respondent submitted that apart from the applicants' own interpretation of s. 46 of the EPF Act, the applicants did not cite any authorities, either *via* statutory provision or case law, to show how and in what way *Ong Kim Chuan* was wrongly or incorrectly interpreted or decided.

[24] On the *non-obstante* point, the respondent argued that both ss. 46 and 65(1) contain this important clause, which terminology had been defined by this court in *Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor;*

Registrar Of Trade Marks (Intervener) & Another Appeal [2015] 4 CLJ 20; [2015] 4 MLJ 166 to mean that any such interpretation to be given must be in line with the objective of the enactment of a statute. Hence, in the context of the present case, the respondent said that the purpose of enacting the EPF Act is to cater for a scheme of savings for employees' retirement.

[25] As such, the respondent contended that the purposive approach in interpretation ought to be adopted (*Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97), particularly in tax-related cases (*Sivamurthy Muniandy & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja* [2012] 9 CLJ 598; [2013] 5 MLJ 533).

[26] Hence, the respondent argued that it is not tied or ought to be tied, as suggested by the applicants, to include the company in its recovery claim of the outstanding contributions under s. 46 of the EPF Act. The interpretational approach undertaken by the applicants is, according to the respondent, an attempt to limit the application of s. 46 of the EPF Act in order for them to escape from the joint and several liability for the contributions due and payable to the fund.

[27] Therefore, the respondent contended that directors cannot evade liability on the grounds that the interim liquidator was appointed and/or the company was finally wound up. Their liability is not subject to the financial status of the company especially when they were the registered directors during the period of default which occurred, on the facts of this case, even before the appointment of the interim liquidator and before the winding up of the company.

Our View

[28] Having perused the cause papers, and having considered the learned counsel submissions, both written and oral, we appreciate the scarcity of the apex court decision on s. 46 of the EPF Act. In fact, of all cases that were cited before us, there are only three authorities which are directly on the point of director's joint and several liability under s. 46 of the EPF Act. They comprise the decision of this court in *Edwin Cassian*; and two decisions of the Court of Appeal in *Ong Kim Chuan*, and *Marzida*. Interestingly, we noted that these three cases are consistent in their interpretation on director's joint and several liability in respect of an outstanding EPF contributions during the period of default.

[29] In *Ong Kim Chuan*, the company was initially sued together with the two directors. However, after its winding up, the respondent withdrew its claim against the company and proceeded only against the two directors on the basis of s. 46 of the EPF Act. We noticed, that some of the arguments

in *Ong Kim Chuan* are somewhat similar with those raised in this case, particularly on the proposition that the directors cannot be held personally liable to pay the debts of the company which had been wound up as the liquidator or official receiver has taken over the affairs of the company. The Court of Appeal in this case has held that:

> Under s. 46, it is crystal clear that directors of a company (including persons or former directors who were directors during such periods in which contributions were liable to be paid to the EPF) **shall together with the company** be jointly and severally liable for the contributions due and payable to the fund. These provisions are to be enforceable 'notwithstanding anything to the contrary in any other written law'.
>
> Being 'jointly and severally liable' the said directors are liable either jointly together with the company or severally on their own independently of the company. In the present case, the plaintiff may choose to initiate its claim against the company (the first defendant) jointly with the two appellants (which was done initially) or to sue the appellants alone without the company (which was done later when the plaintiff withdrew its claim against the first defendant after the first defendant was wound up). The liability of the appellants (as directors at the relevant times) is based on the provisions of s. 46 of the EPF Act above, not on common law or any other written law, not even the Companies Act 1965. Section 46 stands by itself 'notwithstanding anything to the contrary in the EPF Act or any other written law'.
>
> …
>
> The plaintiff had decided not to proceed with its claim against the first defendant company. Instead the plaintiff proceeded against the appellants as allowed under s. 46 of the EPF Act. **The plaintiff has the right and choice to do so.** There is nothing unlawful about that …
>
> (emphasis added)

[30] The applicants, in contesting the interpretational approach by *Ong Kim Chuan*, argued that the Court of Appeal in *Ong Kim Chuan* had not addressed its mind on the actual words of s. 46 of the EPF Act, in particular the phrase "shall together with the company". The applicants, while agreeing that s. 46 of the EPF Act creates a statutory liability on directors, however disagree with the pronouncement by *Ong Kim Chuan* that "The plaintiff has the right and choice to do so", as that would mean omitting the words that are found in the provision itself, *ie*, on the applicants' understanding, naming and making the company a party together with the directors by the words "shall together with the company".

[31] With due respect, we disagree. Having analysed *Ong Kim Chuan*, we found that the Court of Appeal did state in its judgment the phrase "shall together with the company", when it said that "Under s. 46, it is crystal clear that directors of a company (including persons or former directors who were

directors during such periods in which contributions were liable to be paid to the EPF) shall together with the company be jointly and severally liable …". Thus, the applicants' submission that the Court of Appeal in that case had not addressed its mind to that phrase was a bare assertion and against the clear wordings of the written judgment.

[32] As we understand it, the Court of Appeal was obviously and fully aware of that phrase, and yet, despite that, it was of the view that the directors can be held jointly and severally liable by virtue of that provision, and that a plaintiff has the right to proceed with its claim against the directors only.

[33] Further, the interpretation of *Ong Kim Chuan* is in fact consistent with the view of this court in *Edwin Cassian*. Although the facts in *Edwin Cassian* are not on all fours with the facts in the present case, however, *Edwin Cassian* dealt with the sole question of giving effect to the joint and several liability in s. 46 of the EPF Act.

[34] In this *Edwin Cassian* case, a bankruptcy notice was filed by the respondent against *Edwin Cassian* alone who was a director of a company for the outstanding unpaid EPF contributions that was recorded in a consent judgment entered into earlier between the respondent and *Edwin Cassian* and the other director. What is important in this case is that, even in the case where the court judgment did not specifically state the word joint and several liability, such judgment was given effect to the liability on a joint and several basis by virtue of s. 46 of the EPF Act. This court there stated that:

> [36] The instant appeal concerns a consent judgment entered into between the parties. Of primary importance is s. 46 of the EPF Act which imposes joint and several liability on the directors of a company for unpaid contributions. These provisions must be given full effect, as they comprise statutory law. It is not open to the courts to stultify, vary or whittle down the clear provisions promulgated by Parliament in relation to liability for EPF contributions, by construing judgments in manner which is not consonant with the EPF Act. In short, the EPF Act prevails over the terms of the judgment.
>
> …
>
> [39] In our considered opinion, the courts below erred in law in invoking the presumption that joint liability means liability for only half the debt and not the full amount. As mentioned earlier, joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promises. The promisee, *ie*, the Board, is therefore entitled to proceed against one promisor, or the other, or both, in order to procure full performance as is evident from s. 44 of the Act.

[35] Of equal importance was the point on the proper party, where this court in *Edwin Cassian* has held, in a similar vein with *Ong Kim Chuan*, that in the case of joint and several liability, the creditor is entitled to proceed against one or the other, or both or any number of debtors, as the case may be. *Marzida* follows *Edwin Cassian*.

[36] Having considered the arguments put forward by the applicants in contesting the interpretational approach by *Ong Kim Chuan* in the manner as was suggested by them, we are not convinced that there is any ambiguity in the interpretation of s. 46 of the EPF Act which requires further clarification by this court. The applicants have not in fact provided us with any authority to support its proposition as to how and where the Court of Appeal had gone wrong in that *Ong Kim Chuan* case. There is also no authority to show that there have been different or conflicting interpretations on s. 46 of the EPF Act in respect of the proper party and the question of liability.

[37] Importantly, we are of the view that this court in *Edwin Cassian* had clearly given effect to the provision in s. 46 of the EPF Act even in case of where the court judgment did not state such phrase of "joint and several liability" in a bankruptcy suit filed against a director only. That case indicated that even if a company is not sued or taken action against together with the directors, the joint and several liability under s. 46 of the EPF Act is effective and capable to be enforced against one director only, in the absence of another director or the company itself.

[38] Having considered all the above, we decided to dismiss this application for leave to appeal. Guided by the established principles governing leave to appeal both in *Syed Kechik* and *Terenganu Forest*, we have considered the following factors:

(i) the interlocutory nature of the case, being a summary judgment application;

(ii) the unlikely prospect of success should leave be granted; and

(iii) the low degree of general/public importance/advantage and the necessity of the legal issue being finally clarified or resolved by the Federal Court.

Conclusion

[39] Consistency in interpretation by the courts, as was shown by the relevant three authorities cited before us means that there is no conflict, as yet, or ambiguity or confusion on the meaning and application of s. 46 of the EPF Act in respect of the proper party and the question of joint and several liability of directors who were/are directors during the period of default to pay the outstanding EPF contributions. *Edwin Cassian* has shown that even

if only one director is sued against, that action is valid and proper in accordance with the said provision where the joint and several liability is given effect and enforceable.

[40] In the result, we are of the view that this application for leave to appeal does not fulfill the threshold requirement under s. 96(a) of the CJA 1964. There is no novelty, neither will further ventilation before us will be of public advantage. The EPF Act assertion, being a piece of social legislation whose paramount objective is to protect the welfare of employees, ought to be enforced.

[41] In the upshot, we therefore dismiss this application in encl. 1 with cost of RM30,000 to the respondent subject to allocatur.